

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN W. CLARKE,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

Agency.

)
)
) Docket No. PH075281F0978

)
) Date: 20 NOV 1984
)

OPINION AND ORDER

The Director of the Office of Personnel Management (OPM) petitions the Board pursuant to 5 U.S.C. § 7703(d) to reconsider its final decision in this case. For the reasons set out below, the OPM petition is denied.

Appellant, an air traffic control specialist, was removed from his position based on charges of participating in an illegal strike and being absent without leave (AWOL) on August 8, 1981. The presiding official did not sustain the charge of strike participation, finding that the agency presented no evidence to prove that a strike continued at appellant's facility past August 6, 1981. He, nonetheless, sustained the one-day AWOL charge and affirmed the removal. Appellant filed a petition for review of the initial decision arguing that the agency did not have the authority to remove him for a single incident of AWOL. In its response the agency merely asserted that removal was a proper penalty for an AWOL charge. The agency did not challenge

the presiding official's determination that a strike was not in progress on August 8, 1981, the date appellant was charged with strike participation. The petition for review was denied by the Board because it did not meet the criteria for review set out at 5 C.F.R. § 1201.115.

Thereafter, the Board reopened the case under authority of 5 U.S.C. § 7701(e)(1)(B) to discuss whether the penalty of removal based on a single AWOL charge was appropriate. After reviewing the relevant factors set out in Douglas v. Veterans Administration, 5 MSPB 313 (1981), the Board determined that a sixty-day suspension was the maximum reasonable penalty which could be imposed on appellant and reversed the removal. The Director of OPM then petitioned for reconsideration of this decision.

Pursuant to 5 U.S.C. § 7703(d), the Director may file a petition for reconsideration with the Board if he determines that the Board erred in interpreting a Civil Service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on civil service law, rule, regulation, or policy directive. See York v. U.S. Postal Service, MSPB Docket No. PH015209159 (December 8, 1983). In his petition for reconsideration, the Director argues that the penalty of removal was appropriate considering the circumstances

of the case and that the Board erred when it mitigated the removal based on the fact that the agency made no showing that the sustained charge of AWOL would have a lasting effect on appellant's abilities to perform his duties.^{1/}


The Director's petition solely concerns the Board's application of the Douglas criteria to the present appeal. However, this contention is not an allegation that the Board erred in interpreting a civil service law, rule, or regulation and it therefore does not constitute a basis for Board reconsideration of its final decision. See Burns v. Department of Transportation, Federal Aviation Administration, MSPB Docket No. SE075281F0498 (August 9, 1984). Accordingly, the Director's petition for reconsideration is DENIED.

^{1/} In challenging the application of this specific criteria set out in Douglas, 5 MSPB at 332, the Director argues that, by requiring the agency to show the lasting effect of appellant's offense on his ability to perform his duties, the Board placed a greater burden of proof on the agency with respect to appellant's removal than the other 11,500 controllers whose removals were upheld. This contention lacks merit. The unstated premise in the Director's argument is that appellant's case is like those cases where we affirmed removals for striking. It is not. Appellant was found guilty of AWOL, not striking. Therefore, it was proper to treat his case differently for purposes of mitigation. Moreover, the decision to mitigate the removal penalty was reached after a thorough analysis and balancing of the Douglas factors relevant to appellant's individual case. The Board considered not only the affect of the offense on appellant's ability to perform his duties but also the nature and seriousness of appellant's offense, his type of employment and his past disciplinary and work record. The Board did not abuse its discretion when it determined to mitigate appellant's removal to a sixty-day suspension.

In addition, the Director requests the Board to review, sua sponte, the presiding official's conclusion that the agency did not prove that a strike was in progress on the day appellant was charged with strike participation. Although the presiding official's finding on strike participation is arguably in conflict with Adams v. Department of Transportation, 735 F.2d 488 (Fed. Cir. 1984), the agency failed, without just cause, to raise the issue in a timely filed petition for review in accordance with Board regulations. Therefore, in the interest of administrative finality, the Board declines to reopen this appeal. See Burns v. Department of Transportation, supra.2/

FOR THE BOARD:

Washington, D.C.


Stephen E. Manrose
Acting Clerk of the Board

2/ We note that The initial decision issued by the presiding official is not precedential, Clarke v. Department of the Navy, 11 MSPB 71 (1982), and that the Director is not entitled to reconsideration of it. Seibel v. Air Force, MSPB Docket No. AT07528010033 (Dec. 28, 1983); Grant v. Department of the Treasury, MSPB Docket No. AT07528110699 (Dec. 28, 1983).

TESTIMONY OF SERVICE

I certify that a copy of the foregoing OPINION AND ORDER was sent by regular mail to:

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